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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TOMMIE HARRIS,

Defendant and Appellant.

B236744

(Los Angeles County
Super. Ct. No. BA379878)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gail Ruderman Feuer, Judge. Affirmed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General for Plaintiff and Respondent.

Defendant and appellant Tommie Harris (defendant) appeals his conviction of assault with a deadly weapon. Defendant’s sole contention on appeal is that the trial court erred and deprived him of his constitutional rights to confrontation and due process by summarily denying his *Pitchess* motion¹ for discovery of police personnel records without conducting an in camera review of the requested documents. We conclude that the trial court properly exercised its discretion. We thus find no error and no deprivation of constitutional rights and affirm the judgment.

BACKGROUND

1. Procedural history

Defendant was charged with committing an assault with a deadly weapon upon Karl Bell (Bell), in violation of Penal Code section 245, subdivision (a)(1).² The information alleged defendant had suffered four prior serious felony convictions within the meaning of section 667, subdivision (a)(1), and within the meaning of the “Three Strikes” law (§§ 667, subs. (b)-(i), 1170.12, subs. (a)-(d).) The information also alleged that defendant had served four prior prison terms within the meaning of section 667.5, subdivision (b). Before trial the court denied defendant’s *Pitchess* motion for discovery of personnel information from the Los Angeles Police Department (LAPD) of complaints “relating to acts of violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause; false arrest, perjury, dishonesty, writing of false police reports . . . and any other evidence of misconduct amounting to moral turpitude”

The trial court granted defendant’s motion to bifurcate trial on the truth of his prior convictions.

After a jury trial, defendant was convicted of assault with a deadly weapon as charged. Defendant waived his right to a jury trial on his prior convictions and the trial

¹ See Penal Code sections 832.7 and 832.8; Evidence Code sections 1043 through 1045; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81–82 (*City of Santa Cruz*); *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

² All further statutory references are to the Penal Code, unless otherwise indicated.

court found true that defendant had served three of the alleged prison terms. The trial court also found true the four felony convictions alleged for purposes of section 667, subdivision (a)(1), and the Three Strikes law. Defendant's *Romero* motion to dismiss his strike priors was denied.³

On October 13, 2011, the trial court sentenced defendant to a total term of 40 years to life in prison, calculated as follows: a third strike sentence of 25 years to life for the assault, enhanced by five years for each of the three serious felony convictions. The court imposed and stayed the two-year enhancement for two of the prior prison term convictions. The court assessed mandatory fines and fees and awarded defendant 319 days of presentence custody credit. Defendant filed a timely notice of appeal from the judgment.

2. Prosecution evidence

On January 9, 2011, at about 10:30 p.m., LAPD Officers Jake McMains and Kyle Gee were patrolling "Skid Row," an area of the city with many homeless people, when they saw defendant striking a prone man in the head with a green metal pipe. The homeless man was later identified as Karl Bell. At trial Officers McMains and Gee were the only prosecution witnesses. Both officers testified that they saw the incident and both identified defendant as the assailant. Officer McMains testified that after Officer Gee stopped the patrol car, he approached defendant, told him to step away from Bell, drop the pipe and get on his knees. Defendant complied, and Officer Gee then handcuffed defendant and placed him in the patrol car.

Bell was treated by paramedics at the scene, but he refused to go to the hospital. Officer McMains took Bell's statement and searched him for weapons, finding none. After his injuries were photographed and bandaged, Bell walked away and was not found later.

³ See generally *People v. Williams* (1998) 17 Cal.4th 148; *People v. Superior Court (Romero)* 13 Cal.4th 497.

3. Defense evidence

Nurse practitioner Esther Frances testified that she treated defendant at the jail following his arrest. She reported seeing abrasions on defendant's left lower leg and one on his scalp. The injuries were not bleeding, but Frances did not remember whether they were fresh or had begun to scab over.

Defendant testified that he was the victim, not the assailant. He claimed he never saw Bell and did not know him. Rather, defendant was sleeping in a chair on the sidewalk with three blankets covering his head when he was awakened by several blows to the head. Defendant testified that the blows knocked him out of the chair and onto his knees, resulting in scraped knees and broken eyeglasses. He also suffered a laceration on his head. It took defendant several minutes to stand up and take off the blankets. When he did, he saw the police officers. He complied with an officer's order to put up his hands, and then was handcuffed and placed in a patrol car. Defendant claimed that he had not seen the green pipe until trial.

DISCUSSION

Defendant contends that the trial court erred in summarily denying his *Pitchess* motion in which he requested any complaints against Officer McMains and Officer Gee relating to dishonest conduct such as perjury, making false reports, and the fabrication of evidence or probable cause.

“[O]n a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. [Citation.]” (*People v. Gaines* (2009) 46 Cal.4th 172, 179 (*Gaines*), citing Evid. Code, § 1043, subd. (b); *City of Santa Cruz*, *supra*, 49 Cal.3d at p. 84; *Pitchess*, *supra*, 11 Cal.3d 531.) Trial courts have broad discretion in ruling on such motions and should carefully balance the conflicting, substantial interests of the officers as well as the defendant. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1043.) “If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be

disclosed. [Citation.]” (*Gaines, supra*, at p. 179, citing *Chambers v. Superior Court* (2007) 42 Cal.4th 673, 679.)

A showing of good cause as required by Evidence Code section 1043, is established by a declaration supporting a *Pitchess* motion which “must propose a defense or defenses to the pending charges. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024 (*Warrick*)). Although the standards for making a showing of good cause are “relatively relaxed” under the statutory scheme, the declaration must set forth a “specific factual scenario” establishing a “plausible factual foundation” for the allegations of police misconduct. (*City of Santa Cruz, supra*, 49 Cal.3d at pp. 84–86; *Warrick, supra*, at p. 1019.)

The trial court is not required to determine whether the potential defense is credible or persuasive. (*Gaines, supra*, 46 Cal.4th at p. 182; see *Warrick, supra*, 35 Cal.4th at p. 1026.) A defendant need only present a “plausible” scenario involving the alleged officer misconduct. In this context, plausible means that the scenario could or might have occurred and that it is internally consistent. (*Warrick, supra*, at pp. 1016, 1025–1026.) However, the defendant is required “to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer’s version of events.” (*Id.* at p. 1021.) “These requirements ensure that only information ‘potentially relevant’ to the defense need be brought by the custodian of the officer’s records to the court for its examination in chambers.” (*Id.* at p. 1024.)

The only issue in the trial court was the truthfulness of the officers. Defense counsel’s declaration in support of the *Pitchess* motion consisted of a denial of all the conduct attributed to defendant in the police report, and the allegation that all statements by Officer McMains, who prepared the report, were false. As there was no allegation that Officer Gee took part in the preparation of the report, defendant was not entitled to discovery of material in Officer Gee’s personnel file. (See *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1023.) We thus review the trial court’s ruling only as it relates to Officer McMains.

Defendant contends that he provided an internally consistent alternate scenario which coupled with his denials, was sufficient to require the trial court to conduct an in camera hearing. The “factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report.” (*Warrick, supra*, 35 Cal.4th at pp. 1024–1025.) However, for such a denial to be sufficient, a copy of the police report should be attached to the motion, unless the trial court takes judicial notice of the preliminary hearing transcript and the relevant facts appear therein. (*People v. Sanderson* (2010) 181 Cal.App.4th 1334, 1338–1339 & fns. 5, 6 (*Sanderson*)). Defendant did not attach a copy of the police report to his motion, and the trial court did not take judicial notice of the facts presented at the preliminary hearing. Instead defense counsel summarized *portions* of the police report in her declaration. The trial court assumed that the summary was accurate but found them to be insufficient.⁴ The following portion of counsel’s declaration was before the trial court (and began mid-sentence):

“a man who was laying [*sic*] on the ground facing away from the male black. The male black was later identified to be Tommy Harris. The man lying down was later identified as Karl Bell. They observed Mr. Harris holding a 4 1/2” [*sic*] foot long green meta [*sic*] pipe in both his hands. Mr. Harris stood over Mr. Bell and lift [*sic*] the metal pipe over his head. Mr. Harris then proceeded to strike Mr. Bell on the top of his head approximately three times. The officers stopped and detained Mr. Harris. Mr. Bell sustained a laceration to the top of his head.

“(b) On information and belief, the defense asserts the following: Mr. Harris was in the vicinity of the incident. Shortly before Mr. Harris’s detention and the beating of Mr. Bell, Mr. Harris was also struck multiple

⁴ As noted by respondent, the copy of the motion in the clerk’s transcript is defective as only every other page has been duplicated. The original was apparently two-sided and only the face pages were copied. We reviewed the superior court file, but it also contains a defective copy. It appears that the trial court had the incomplete motion before it, as defense counsel referred to “the missing statement from my declaration” and apologized to the court, explaining that her secretary was responsible for the filing. Defendant’s briefs do not address the problem despite respondent’s mention. However, defendant refers only to the facts on page seven of counsel’s declaration and contends that those facts were sufficient to support the motion. We therefore assume defendant does not claim that the incomplete declaration precludes effective review.

times by an unknown person. Mr. Harris was under a blanket trying to sleep at the time he was attacked. Mr. Harris was treated by the jail dispensary for injuries to his legs. When he was finally able to untangle himself from under his blanket, the officers were arriving on the scene and detaining him. The incident occurred directly across the street from the Volunteer Center of America Drop-in Center. This is a location with a large population of transient people. At the time of the incident, it was essentially a tent city along the sidewalk where Mr. Harris and Mr. Bell were sleeping. Mr. Harris denies all the actions in the police report that are being attributed to him.

“(c) The above stated fabrications and misrepresentations are legally important in that they both create a source of probable cause for the arrest of the [*sic*] Mr. Harris when in truth none existed and create substantial false ‘evidence’ for the underlying offense. Officer McMains provided the written report which contained the fabrications, for which Officer Gee is said to have seen the same activity. Their misrepresentations of the entire story would provide direct and circumstantial evidence to [*sic*] relating to count 1, a violation of Penal Code section 245(a)(1).”

In addition to the portion of the police report summarized in defense counsel’s declaration, the trial court accepted as accurate that part of the report read into the record by counsel for responding party City of Los Angeles. Counsel read:

“Officer McMains . . . then spoke with the victim, who stated to me that he was laying [*sic*] down on the sidewalk trying to sleep. He then heard footsteps approach him, so he looked behind him and observed the suspect holding a green metal pipe. The suspect then lifted the green metal pipe over his head, and, without saying a word to him, the suspect proceeded to strike him numerous times on his head until he heard my partner and I give the suspect commands. The victim then advised me that he has never met the suspect prior to this incident and does not know why he was hit.”

Defense counsel also represented that there were statements in the police reports regarding the officers’ observation of defendant’s “preexisting injuries” which were not treated at the scene only later at the jail.

The trial court found that the declaration consisted of “nothing more than a denial.” Citing the trial court’s description of defendant’s scenario as “far-fetched,”

defendant suggests that the trial court improperly based its finding on its disbelief of defendant's version of the events. We disagree. Despite its choice of words, the trial court explained that it had adopted the City Attorney's reasoning, which included the argument that defendant had disregarded important facts stated in the police report and thus failed to provide a complete alternate scenario. Indeed, defendant did not deny that his injuries were preexisting; nor did he claim that he suffered them that night. Defendant did not deny that Bell identified defendant as his assailant; nor did he provide facts suggesting that Bell's version of the attack was inaccurate. In addition, defendant's claim to know that Bell was assaulted while defendant was sleeping with his head covered was internally inconsistent and incomplete as it lacked any explanation of how defendant came by this knowledge.

The cases cited by defendant do not provide useful comparisons as the materiality of the discovery request in each case was determined by a reading of the police reports (not summarized excerpts as in this case) in conjunction with defense counsel's affidavits. (See, e.g., *People v. Moreno* (2011) 192 Cal.App.4th 692, 699–700; *People v. Johnson* (2004) 118 Cal.App.4th 292, 299–300; *Brant v. Superior Court* (2003) 108 Cal.App.4th 100, 105; *People v. Husted* (1999) 74 Cal.App.4th 410, 418.)

The trial court's discretion in ruling on a *Pitchess* motion is broad, and is reviewed under an abuse of discretion standard. (*People v. Cruz* (2008) 44 Cal.4th 636, 670.) Under that standard, judicial discretion is abused only when the court exceeds the bounds of reason under all of the circumstances by making an arbitrary or capricious determination. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

We find no abuse of discretion here. To show good cause, defendant was required to explain his own actions in the light of all relevant circumstances in a manner that adequately supported his defense. (*Sanderson, supra*, 181 Cal.App.4th at p. 1340; *People v. Thompson* (2006) 141 Cal.App.4th 1312, 1317–1318.) Defendant failed to do so. Defendant submitted a blanket denial of all statements made by the officers without placing all of the statements before the trial court. Moreover, defendant did not show that his version of the events would support a defense, as his version could reasonably be

reconciled with a scenario in which he thought he had been attacked while under the covers, uncovered himself, and then attacked Bell in full view of the police. Thus, “the trial court could reasonably conclude that defendant failed to demonstrate sufficient good cause insofar as defendant ‘did not present a specific factual scenario that is plausible when read in light of the . . . undisputed circumstances.’ [Citation.]” (*Sanderson, supra*, at p. 1340, quoting *People v. Thompson, supra*, at p. 1316.)

As we have found that the trial court properly followed the *Pitchess* and statutory discovery procedures, we also reject defendant’s constitutional claims. (See *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 8.)

DISPOSITION

The judgment is affirmed.

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_____, J.

CHAVEZ

We concur:

_____, Acting P. J.

DOI TODD

_____, J.

ASHMANN-GERST